84-1768

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ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ALABAMA DEPARTMENT OF CORRECTIONS,

PETITIONER

V.

WILLIE JAMES GLOVER,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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I.

QUESTION PRESENTED

WHETHER OR NOT THE TAXING OF ATTORNEY'S FEES PURSUANT TO 42 U.S.C. §1988 AGAINST A STATE AS COSTS WHERE THE STATE WAS NEITHER A PARTY OR HELD LIABLE PURSUANT TO 42 U.S.C. §1983 IS VIOLATIVE OF THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

II.

PARTIES TO THE PROCEEDING

The following are parties to this action:

1. Willie James Glover
2. Alabama Department of Corrections
3. James Towns

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BRIEF FOR PETITIONER

OPINIONS BELOW

1. The opinion of the United States District Court for the Middle District of Alabama appears in Appendix A.

2. The opinion of the United States Court of Appeals for the Eleventh Circuit appears in Appendix B.

3. The opinion of the United States Court of Appeals for the Eleventh Circuit denying rehearing and suggestion for en banc consideration appears in Appendix C.

JURISDICTION

The jurisdiction of this Court is based on 28 U.S.C. §2101. The order of the United States Court of Appeals for the Eleventh Circuit was issued February 27, 1985, and this petition is filed within sixty (60) days of said date.

QUESTION PRESENTED FOR REVIEW

I. Whether or not the taxing of attorney's fees pursuant to 42 U.S.C. §1988 against a state as costs where the state was neither a party or held liable pursuant to 42 U.S.C. §1983 is

violative of the Eleventh Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution, which provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §§1983 and 1988, which appear in their entirety in Appendix D.

STATEMENT OF THE CASE

THE DISTRICT AND APPELLATE COURT PROCEEDINGS

This action was originally filed by Plaintiff, Willie James Glover, in the

Middle District of Alabama in March, 1979, as a pro se inmate complaint. The original complaint named the following as Defendants: Larry D. Bennett, James C. Cooke, James Towns, Hardy Sims, and the Alabama Board of Corrections. On July 26, 1979, Plaintiff added Defendant, Robert G. Britton, to the action by amended complaint.

On May 21, 1979, the District Court appointed Magistrate Lewis Gwaltney as Special Master in this case.

Directed verdicts were granted at the conclusion of Plaintiff's trial for all defendants except James Towns. The jury returned a verdict against Towns in his individual capacity for twenty-five thousand dollars punitive damages and one dollar compensatory damages. Attorney's fees were taxed by the District Court as

costs against the State of Alabama.

Appeal was taken to the United States Court of Appeals for the Eleventh Circuit. The case was affirmed. Rehearing was requested; it was denied on February 27, 1985.

THE FACTS

In November of 1978, Plaintiff, Glover, a prisoner in Alabama's Draper Correctional Center was stabbed by a fellow inmate. The stabbing occurred the day after Defendant, Officer James Towns, stated to a group of inmates that Glover's life was worth only five or six packs of cigarettes.

REASONS FOR GRANTING THE WRIT

I. WHETHER OR NOT THE TAXING OF ATTORNEY'S FEES PURSUANT TO 42 U.S.C. §1988 AGAINST A STATE AS

COSTS WHERE THE STATE WAS NEITHER A PARTY OR HELD LIABLE PURSUANT TO 42 U.S.C. §1983 VIOLATIVE OF THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

This case raises issues concerning an attorney's fee award made under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. §1988. The District Court assessed attorney's fees and costs against the State of Alabama. The State of Alabama respectfully argues that the affirmance of the District Court's award placed the Eleventh Circuit in error.

Foremost, the law is clear that a state is immune from damages under the Eleventh Amendment to the United States Constitution. In Edelman v. Jordan, 415 U.S. 651 (1974), this Court held:

> "Thus the rule has evoked that a suit by private parties seeking to impose a liability which must be paid from public funds in the State Treasury is barred by the Eleventh Amendment."

In Quern v. Jordan, 440 U.S. 332, 334 (1979), this Court considered suits brought pursuant to 42 U.S.C. §1983 and specifically held that states are immune from an award of damages under 42 U.S.C. §1983. The Court in Quern, 440 U.S. at 341, stated that Congress did not intend to abrogate state Eleventh Amendment immunity in enacting 42 U.S.C. §1983. It is also clear that the Eleventh Amendment would bar an award for damages against a state official in his official capacity. Williams v. Bennett, 689 F.2d 1370, 1378 (11th Cir. 1982), cert. denied, ___U.S.___, 104 S.Ct. 335, (1984).

Accordingly, there is no doubt that

a suit against the State of Alabama is barred by the Eleventh Amendment, unless Alabama consents to such an action. Alabama v. Pugh, 438 U.S. 781 (1978). However, Alabama is prohibited from granting said consent. Ala. Const. Art. 1, §14.

In the present case, Glover received a substantial award of damages from Defendant Towns in Towns' individual capacity. Glover did not receive a judgment against the State of Alabama or the Alabama Board of Corrections. Petitioner submits that Glover is prohibited from receiving an attorney's fee award under 42 U.S.C. §1988 from an entity he did not "prevail" against in his §1983 suit. Glover prevailed against Towns in Towns' individual capacity only and did not, in fact, prevail against the

Alabama Board of Corrections.

Petitioner is well aware of this Court's opinion in Hutto v. Finney, 437 U.S. 678, (1978). This opinion, upon first glance, seems to authorize an award of attorney's fees against a state even when that state has not been named as a party and has not consented to the removal of its Eleventh Amendment immunity. However, the holding in Hutto is distinguishable from the instant case; therefore it does not bind the Court in this case.

Initially, the suit in Hutto concerned a claim for injunctive relief arising out of an action commencing in 1969. The Court determined that "suits brought against individual officers for injunctive relief are, for all practical purposes, suits against the State

itself." Id. at 700. Furthermore, the suit in Hutto concerned a gross violation of previous district court orders and encompassed the entire Arkansas prison system. The violations were of such magnitude as to prohibit the assessment of damages against any single individual. In fact, the Court stated that "the individual officers have no personal interest in the conduct of the State's litigation." Id. at 700, n. 32. The officials named in Hutto were sued in their official, not individual, capacities. Finally, these officials were determined to be litigating in bad faith. Id. at 689.

The Supreme Court in Hutto appears to state that the representation of defendants by the Arkansas Attorney General throughout the litigation

evidences sufficient action by Arkansas to justify an attorney's fee award against the state's interest. The State of Alabama respectfully submits that its involvement of the instant case is not indicative of sufficient state involvement to justify the award of attorney's fees against the State. The office of the Alabama Attorney General conducted a general defense on behalf of all defendants named in this action. As previously stated, at the conclusion of the trial, all but Defendant Towns received a directed verdict.

Mr. Justice Rehnquist dissenting in Brandon v. Holt, 53 U.S.L.W. 4122 (U.S. Jan. 21, 1985) stated that the Court's decision in Hutto was "more readily interpreted as an estimate of what would probably happen in the particular case,

than as a cyptic announcement of the novel doctrine for which the Court now says that it stands." Id. at 41.

The State's liability, in addition to being foreclosed by this Court's interpretation of the Eleventh Amendment's bar to liability, also raises serious problems concerning the stability of the State's penal system. The State has a direct interest in providing sufficient numbers of employees to staff the various positions in the Alabama Prison System. However, the Eleventh Circuit's opinion in this case would conceivably jeopardize the State's ability to provide representation for state officials against the ever-increasing multitude of lawsuits filed by state prison inmates. Knowing that appearances for its employees would

result in insurmountable fees and costs which in turn will inflict undue hardship upon the State Treasury, the State will, in all likelihood, become increasingly hesitant to undertake such representation. The unavoidable result would be that state prison officials be required to employ private counsel. A migration from the Department of Corrections would in all likelihood follow.

CONCLUSION

In conclusion, the Petitioner, the Alabama Department of Corrections, respectfully submits that the decision and opinions of the United States District Court for the Middle District of Alabama and the Court of Appeals for the Eleventh Circuit taxing attorney's fees

against the State of Alabama are in error. For this reason, Petitioner prays that this Honorable Court will issue the writ of certiorari and review the above-mentioned opinions and upon such review will reverse those portions of the decision of said Courts, pertaining to the issue of as the attorney's fees.

Respectfully submitted,

Charles A. Graddick

CHARLES A. GRADDICK
ATTORNEY GENERAL

Billington M. Garrett

BILLINGTON M. GARRETT
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Billington M. Garrett, an Assistant Attorney General and a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the Alabama Department of Corrections, Petitioner, do hereby certify that on this 9th day of May, 1985, I did serve the requisite number of copies of the foregoing on the Attorney for Willie James Glover, Respondent, by mailing same to him, first class postage prepaid and addressed as follows:

Honorable Frank Wilson
P.O. Box 4357
Montgomery, Alabama 36107

Billington M. Garrett
BILLINGTON M. GARRETT
ASSISTANT ATTORNEY GENERAL

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6589

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

WILLIE JAMES GLOVER,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
VS.	)	NO. 79-124-N
	)	
ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,	)	
	)	
	)	
Defendants.	)	

JUDGMENT

In accordance with the Memorandum Opinion entered in the above-styled cause on this date, it is ORDERED, ADJUDGED and DECREED by this Court as follows:

1. That the Magistrate's recommendation and the verdict are supported by a preponderance of the evidence and are hereby adopted by this Court;

2. That the jury verdict and

judgment entered against Defendant Towns on August 13, 1980, in the amount of $1.00 in compensatory damages and $25,000.00 in punitive damages are reasonable and should stand;

3. That the judgment entered against Defendant Towns on August 13, 1980, is against Defendant Towns in his individual capacity;

4. That Plaintiff, Willie James Glover, as the prevailing party is hereby awarded the sum of $5,902.95 as a reasonable attorney's fee in this cause and said attorney's fee is hereby taxed as costs against the State of Alabama;

5. That judgment be, and the same is hereby, entered on the Magistrate's directed verdict in favor of Defendants, The Alabama Board of Corrections, Larry D. Bennett, James C. Cook and Robert J.

Britton; and

6. That the above-styled cause is hereby dismissed with costs taxed against the State of Alabama, for which execution may issue.

DONE this 13th day of December, 1982.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

WILLIE JAMES GLOVER,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
VS.	)	NO. 79-124-N
	)	
ALABAMA DEPARTMENT OF CORRECTIONS; ET AL.,	)	
	)	
Defendants.	)	

OPINION

This cause is now before the Court on the Magistrate's recommendation filed herein September 23, 1982, and on the Defendant's objection thereto filed herein October 6, 1982.

This case has a lengthy history and has been before the United States Court of Appeals for the Fifth Circuit on two occasions. In Glover v. Alabama Board of Corrections, 651 F.2d 1014 (1981), [hereinafter Glover I], the Fifth Circuit held that it did not have jurisdiction to

review the case because the District Court had not entered a final judgment. On Plaintiff's petition for rehearing, the Fifth Circuit Court of Appeals again held that there had been no entry of final judgment in the case due to a discrepancy in the consent form signed by the parties[1] to have the case tried before the United States Magistrate, and the Appellate Court denied the petition

[1]The Court held that this Court's failure to include in its waiver form the CODE section, authorizing an agreement that the Magistrate try the case, nullified an agreement to have the Magistrate try the case under which the Magistrate, with a jury and without objection, tried the case under the provisions of 28 U.S.C. § 636(c). The Clerk's letter to the parties, notifying of the right to a trial of all issues by the Magistrate upon consent of the parties pursuant to § 636(c), was not a part of the record, but it apparently notified all parties of the fact that the agreement would be that the Magistrate proceed pursuant to § 636(c).

for rehearing. Glover v. Alabama Board of Corrections, 660 F.2d 120 (5th Cir. 1981) [hereinafter Glover II].

The reason for the lengthy delay in this Court's ruling since the Defendant's brief was filed on February 9, 1982, is that the only transcript in this case had, apparently, been misplaced and has just been located in the past few weeks.

On February 28, 1979, the Plaintiff in this cause filed a motion for leave to file and proceed in forma pauperis with this complaint in which he alleged violation of his civil rights. On March 22, 1979, said motion was granted. On May 21, 1979, this Court entered an Order appointing Magistrate M. Lewis Gwaltney as Special Master in this case. On July 18, 1979, the Magistrate appointed Julian L. McPhillips as Plaintiff's attorney in

this cause. On January 14, 1980, the case was assigned for trial to the Magistrate pursuant to the October, 1979, Amendments to the Federal Magistrates Act, 28 U.S.C. § 636. This assignment took place after all parties had consented in writing to trial before the Magistrate. It is this consent form that has caused the confusion resulting in the present posture of this case. After said consent, this case came for jury trial on August 11, 1980, before the Magistrate. The trial reached its conclusion on August 12, 1980, after the Magistrate had directed a verdict in favor of Defendants, Alabama Board of Corrections, Larry D. Bennett, James C. Cooke and Robert J. Britton, and the jury had returned a verdict in favor of the Plaintiff against Defendant, James Towns

for $1.00 in compensatory damages and $25,000.00 in punitive damages. The Magistrate entered judgment on said jury verdict on August 13, 1980.

As mentioned above, it is the consent forms signed by the Defendants on January 9, 1980, and signed by the Plaintiff on January 10, 1980, that have been resposible for bringing this case to its present posture. Both Plaintiff and Defendants now say that they thought they were consenting to a Magistrate's trial pursuant to U.S.C. § 636(c). This Court of Appeals has construed the document as a consent for a Magistrate's hearing pursuant to § 636(b). Glover II, supra, at 124. Defendants' first objection is that, pursuant to these consent forms, the Magistrate did not have subject matter jurisdiction to hear this case.

It is the opinion of the Court that he did. In Glover II, the Court of Appeals ruled that the consent form provided by the District Court was ambiguous in that it did not specify whether the consent was to a trial before the Magistrate under 28 U.S.C. § 636(b) or 28 U.S.C. § 636(c). The Fifth Circuit Court of Appeals stated its concern that, absent specific consent by the parties, a judgment by the Magistrate - a non-Article III Judge - would undermine the objectives of Article III of the United States Constitution and might violate the rights of the parties. In addition, the Circuit Court emphasized its belief that it was the intent of Congress to require the specific, clear expression of consent before allowing a magistrate authority to conduct a trial under 28 U.S.C. § 636(c). Thus, the

Fifth Circuit in Glover II stated:

> "We interpret the consent of the parties as given in this case as extending only to the jurisdiction of the Magistrate under the provisions of 28 U.S.C. § 636(b)."

Eliminating as we must the possibility of § 636(c) consent amounted to, at least, a § 636(b) consent.

This Court, having recognized that the parties in this cause did consent to the Magistrate's exercising jurisdiction under 28 U.S.C. § 636(b), approaches the issue whether under the provisions of § 636(b) the Magistrate had the authority to conduct a trial. It is the opinion of this Court that he did.

> "(2) *** A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States District Courts. A judge may designate a magistrate to serve as a special

> master in any civil case, upon consent of the parties, without regard to the provisions of Rule 53(b) of the Federal Rules of Civil Procedure for the United States District Courts.
>
> "(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b).

In his brief, Plaintiff cites several cases from other circuits which have held that parties may constitutionally consent to the trial of a civil matter before a magistrate under 28 U.S.C. § 636(b). See, DeCosta v. Columbia Broadcasting Systems, 520 F.2d 499 (1st Cir. Small v. The Olympic Prefabricators, 588 F.2d 287 (9th Cir. 1978); Muhich v. Allen, 603 F.2d 1247 (7th Cir. 1979); Hill v. Jenkins, 603 F.2d 1256 (7th Cir. 1979). This Court is satisfied that the Fifth Circuit Court of Appeals disposed of this

matter in Calderon v. Waco Lighthouse for the Blind, 630 F.2d 352 (5th Cir. 1980). In Calderon the Fifth Circuit Court of Appeals held:

> "Although the statute [prior to the 1979 amendments] does not explicitly provide for referral of a civil case to a magistrate for trial on the merits, subsection (b)(3) broadly provides that: '[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.' 28 U.S.C. § 636(b)(3).[2] That provision has been interpreted by other circuits to permit consensual reference to a magistrate for trial on the merits in civil rights cases and others. [citations omitted]. We find that consensual references to a magistrate for a trial on the merits were permitted under subsection (b)(3) independent of Rule 53 of the Federal Rules of Civil Procedure and subsection (b)(2) [permitting

---

[2]The use of a jury is consistent with the Constitution and laws of the United States, and therefore, is not objectionable.

> appointment of a msgistrate as a special master] even before the 1979 amendments to the statute."

The Fifth Circuit Court of Appeals further stated:

> "We hold today that, under subsection (b)(3), a district judge may refer a civil case to a magistrate for trial on the merits if the parties consent and if the magistrate's findings are subject to de novo determination by the district court." Calderon, supra, at 355, n. 3.

Defendant Towns now argues that the consent form signed by his attorney in this cause was signed in the belief that said consent was being given for the Magistrate to exercise his jurisdiction pursuant to 28 U.S.C. § 636(c) and that, since the Fifth Circuit Court of Appeals has held that the parties could not have consented under § 636(c) due to the deficiency of the forms provided,

Defendant Towns' consent is now null and void. Defendant Towns argues that he did not consent for the Magistrate to exercise jurisdiction under 28 U.S.C. § 636(b), and, therefore, a Magistrate cannot conduct a civil trial pursuant to said § 636(b) without the consent of the parties. It is the opinion of this Court that said argument is meritless. As stated above, upon the uncontested finding of the Court of Appeals, this Court recognized that the Defendants in this cause did consent for the Magistrate to exercise jurisdiction pursuant to 28 U.S.C. § 636(b).

Assuming, arguendo, that the Defendants did not consent for this cause to be tried before a Magistrate[3], it is the opinion of this Court that, absent jurisdiction problems, said Defendants waived any objection they might have had to having this cause heard before said Magistrate. Other than appointing the Magistrate and presiding over the selection of the jury in this cause, this Court had no contact with the case whatsoever. All other proceedings, motions, the pretrial hearing and the jury trial on the merits were conducted by the Magistrate. The Defendants

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[3]The subject consent, executed and filed by attorneys for both sides, read as follows: "I understand, absent consent of all parties, that this case will be tried before a United States District Judge. [emphasis added] I hereby consent to the Magistrate's exercising jurisdiction in the above-styled case."

participated actively in all phases of this cause and never once objected to the Magistrate's conducting said cause. Defendants filed requested jury instructions, cross-examined Plaintiff's witnesses, moved for a directed verdict, called witnesses and made final arguments to the jury. At no time did any party in this cause attempt to withdraw his consent or object to the Magistrate's overseeing the course of this action. As the Sixth Circuit Court of Appeals stated in Hill v. Duriron Co., 656 F.2d 1208 (6th Cir. 1981), citing Calderon, supra:

> "Ordinarily a party who objects to a reference to a magistrate must make his objections known either at the time of reference or soon thereafter. [citations omitted] To permit such objections after the magistrate makes his findings and recommendations would certainly not serve the cause of judicial economy. Parties who did not

> prevail before the magistrate would routinely seek to have the reference set aside for reasons that either could have been corrected or would have stopped the proceedings if promptly brought to the referring court's attention."

It is the opinion of this Court that Defendants' continued participation in this action without objection since it was originally referred to the Magistrate on May 21, 1979, through the Magistrate's entry of judgment on the jury verdict on August 13, 1980, waived any objection, if any, said Defendants might have had to the trial before said Magistrate. As the Eleventh Circuit Court of Appeals said in the recent case of Nettles v. Wainwright, 677 F.2d 404, 410 (11th Cir. 1982):

> "We note that attorneys are officers of the court and are, therefore, in some part implicitly responsible for the efficient operation of the judicial system. Requiring

> them to assist the district court by stating their objections is a small order."

Defendants' second objection is that the Magistrate's recommendation that judgment in this case be entered against Defendant Towns in both his individual and official capacity is error because an award of damages against a State official in his official capacity is barred by the Eleventh Amendment to the United States Constitution. Defendants' objection is well taken, especially in light of the recent decision of the United States Court of Appeals for the Eleventh Circuit in Williams v. Bennett, 689 F.2d 1370 (11th Cir. 1982). In Williams, the Eleventh Circuit court of Appeals stated:

> "The Board [of Corrections] may not be subject to suit; however, while its officials and/or employees may not be sued in their official capacities, they are, individually, subject to suits

> for acts or omissions in connection with their official duties." At 1378.

Therefore, judgment against Defendant Towns will be entered in his individual capacity only.

Defendants' third objection is to the Magistrate's recommendation that the attorneys' fee awarded to Plaintiff Glover as a prevailing party pursuant to 42 U.S.C. §1988 be awarded against the State of Alabama. Defendants argue that an award of attorneys' fees cannot be granted against an official in his official capacity when only monetary relief is granted. Defendants argue that no relief was granted to the Plaintiff against Defendant Towns in his official capacity and, thus, attorneys' fees cannot be awarded against the State of Alabama.

Plaintiff in this cause was a "prevailing party" within the meaning of 42 U.S.C. §1988. In the case of Barrett v. Thomas, 649 F.2d 1193 (5th Cir. 1981), the Fifth Circuit Court of Appeals stated:

> "It is beyond settled law that a Section 1988 attorney's fees award may run against a public treasury for Section 1983 violations by public officers acting in their official capacities even though the public entity is not named as a defendant in the suit." Barrett, supra, at 1201.

In the instant case, the Defendants admit in their answer to the Plaintiff's amended complaint that the Defendants' "* * * conduct was within the scope of the discretion and responsibilities of their public offices and was reasonable and proper in light of all the circumstances as they appeared at the time of their conduct * * *." Therefore,

Defendants admit that Defendant Towns was acting as an agent of the State of Alabama at all times material to Plaintiff's complaint. In addition, Defendant Towns was represented by the Attorney General of the State of Alabama throughout these proceedings. This is a fact deemed highly relevant to the United States Court of Appeals for the Fifth Circuit in Barrett, supra, in deciding whether to tax attorneys' fees against the State. It does seem logical that the Attorney General, i.e., the State of Alabama, would not have expended the resources of the State of Alabama to defend Defendant Towns had he not been acting within the scope of his employment during the times relevant to this lawsuit. The Supreme Court of the United States commented on "the inherent unfairness of awarding attorneys' fees

against public officials individually without permitting the claim to run against the public entity," Hutto v. Finney, 437 U.S. 678, 699, n. 32. It is the opinion of this Court that taxing attorneys' fees against the State of Alabama pursuant to 42 U.S.C. §1988 is proper and judgment will be entered accordingly.

The Defendants' fourth objection is that the amount of attorneys' fees awarded in this case - $5,902.95 - is excessive. The decision to award attorneys' fees under 42 U.S.C. §1988 is within the discretion of the district court, but attorneys' fees should be generally awarded to prevailing plaintiffs absent special circumstances. See, Doe v. Busby, 684 F.2d 1375 (11th Cir. 1982). A district court by statute

has been given broad discretion in awarding attorneys' fees in civil rights actions. In determining the amount of the fee, the Magistrate's opinion on the Plaintiff's motion for taxing of attorneys' fees seems to trace the criteria set out in Johnson v. Georgia Highway Express, 488 F.2d 714. It is the opinion of this Court that the amount of $5,902.95 is a reasonable attorney's fee in this cause for Plaintiff's attorney.

Fifthly, the Defendants object to the findings and recommendation of the Magistrate on the ground that there was insufficient evidence to establish that Defendant Towns violated Plaintiff's rights protected under the Eighth and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. §1983. After reviewing the record in

this cause, it is the opinion of this Court that there was sufficient evidence to sustain the jury's verdict. It is the opinion of this Court that, in light of Williams, supra, Plaintiff need not establish that the conditions at the prison constituted cruel and unusual punishment in violation of the Eighth Amendment at the time said Plaintiff was assaulted because Williams holds that the consolidated cases of Pugh v. Locke, 406 F.Supp. 318 (M.D. Ala. 1976) affm'd, with modifications sub nom. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), reversed in part sub nom. Alabama v. Pugh, 438 U.S. 781 (1978); conclusively established that the conditions at the prison constituted cruel and unusual punishment in violation of Plaintiff's constitutional rights during the time period relevant to this case. However, assuming, arguendo, that

Williams does not stand for the above-stated premise, it is the opinion of this Court that the record in this case would establish said constitutional violation.

Having established that Williams was the victim of a constitutional violation, Plaintiff Glover's next burden was the attachment of legal responsibility for his injuries to Defendant Towns. This required proof of callous indifference. Williams, supra, at 1386. It is the opinion of this Court that Plaintiff Glover carried this burden. Three witnesses testified that Defendant Towns made the statement that he would reward other prison inmates if the Plaintiff were injured or killed. There was further evidence that, shortly after the above statement was made, Plaintiff Glover was stabbed by a fellow inmate.

It appears without doubt that a certain prison inmate was aware of this offer and, on more than one occasion, attempted to kill Plaintiff by stabbing him with a knife. In the first instance, the knife missed Plaintiff's heart by only a fraction of an inch, causing him to be hospitalized. This was evidence from which the jury could have inferred that the statements made by Defendant Towns proximately caused the knife-wielding inmate to stab Plaintiff. The evidence in this case, if believed, shows a callous indifference on the part of Defendant Towns to Plaintiff's need for protection from violence and, thus, was actionable as an Eighth Amendment violation under §1983. The premises considered, this Court finds that the preponderance of the evidence in this case supported the verdict of the jury

and the recommendation of the Magistrate.

Defendants' sixth objection is that the verdict returned by the jury in this case was excessive and caused by bias or prejudice. The jury in this case returned a verdict of $1.00 as compensatory damages and $25,000.00 as punitive damages. The jury was instructed on punitive damages as well as compensatory damages. They were instructed that, even though the Plaintiff had failed to prove any actual damages, if the jury found that Defendant Towns had violated Plaintiff's constitutional rights, it must return a verdict for compensatory damages in at least a nominal sum and that $1.00 was considered to be a nominal sum. This instruction, as well as the Magistrate's instruction as to punitive damages, was not objectionable. The standard this

Court must apply when reviewing the jury's award of damages was set forth by the Fifth Circuit Court of Appeals in the case of Adams v. Ford Motor Credit Co., 556 F.2d 737 (5th Cir. 1977):

> "The standard of review of allegedly excessive damages, whether punitive or compensatory, does not differ as between the Alabama rule and that followed by the federal courts. All courts are extremely reluctant to interfere with a jury verdict which may be based on such widely ranging bases as desire to punish a party for improper conduct and a desire to create a deterrent to similar conduct by others. * * * The right of a plaintiff to have this fact decided by jury evolves from the Seventh Amendment to the Constitution and it is only in case the amount awarded by a jury appears to be so excessive as to be unconscionable and to arise from bias or prejudice that the appellate court considered it appropriate to intervene." Adams, supra, at 740.

The jury may well have concluded that a verdict of $25,000.00 punitive damages

would stand as a warning to those who, having custody of prisoners, had a callous disregard for their welfare. It is the opinion of this Court that the verdict of $1.00 compensatory damages and $25,000.00 punitive damages awarded by the jury in this case is not so excessive as to be unconscionable, nor must it have arise from bias or prejudice.

Defendants' seventh objection is that the Magistrate erred in allowing into evidence testimony regarding certain difficulties the Defendant Towns had had with prison administrators. Defendants argue that said testimony was irrelevant and highly prejudicial.[4] The admission of evidence, within limits, is committed

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[4]Evidence of other wrongs may be admissible to show motive, intent or absence of mistake or accident. Rule 404(b), Rules of Evidence. See, generally, Rules 401-405.

to the discretion of the trial judge. See, United States v. Hearod, 499 F.2d 1003 (5th Cir. 1974). Furthermore, the decision as to whether probative value of otherwise relevant evidence is substantially outweighed by the danger of unfair prejudice is one to be made by the trial court. See, United States v. Marino, 617 F.2d 76 (5th Cir. 1980). In the instant case, it is the opinion of the Court that the evidence objected to was relevant. Plaintiff had the burden of proving that Defendant Towns exhibited a callous disregard toward Plaintiff's constitutional right to be free from cruel and unusual punishment. Certainly, the evidence as to other problems Defendant Towns may have had with prisoners would go to Defendant Towns' intent, preparation, plan, etc. In view of the fact that Towns also testified to

such problems, it is the opinion of this Court that it was, at most, harmless error.

The Defendants' eighth objection is that the Magistrate failed to recommend that judgment be entered in favor of Defendants, The Alabama Board of Corrections, Larry D. Bennett, James C. Cook and Robert J. Britton. As mentioned above, at the trial of this case, the Magistrate granted a directed verdict in favor of said Defendants. However, the Magistrate failed to recommend that judgment be entered in favor of said Defendants. This Court agrees with Defendants that judgment should be entered in favor of Defendants Bennett, Cook, Britton and Alabama Board of Corrections on the directed verdict.

Defendants' ninth objection to the recommendation of the Magistrate was that

the Magistrate failed to make specific findings with regard to motions by the Defendants, both during the course of the trial of this case and on Defendants' post-trial motions. As stated above, this case was tried before a jury on August 11 and 12, 1980. On August 12, 1980, a verdict was directed in favor of Defendants Bennett, Cook, Britton and Alabama Board of Corrections. On the same date, after the cause had been submitted to the jury, a verdict was returned by said jury against Defendant Towns in the amount $1.00 compensatory damages and $25,000.00 punitive damages. Said jury verdict was dated and signed by the foreperson. On August 13, 1980, the Magistrate entered judgment on the jury's verdict. Subsequent to the entry of said judgment by the Magistrate, Defendant Towns timely filed a motion for new trial

and a motion to vacate the judgment. In addition, the Plaintiff timely filed a motion to amend the judgment and a motion for the allowance of attorneys' fees. On September 24, 1980, the Magistrate entered an Order denying Defendant Towns' motion for a new trial and motion to vacate the judgment. In the same Order, the Magistrate also denied Plaintiff's motion to amend the judgment so as to show that the judgment was against the Defendant, James Towns, in his individual and official capacity. On October 7, 1980, the Magistrate entered a Memorandum Opinion and Order taxing attorneys' fees. On October 14, 1980, Defendant Towns filed objection to the award of attorneys' fees. On November 4, 1980, the Magistrate entered an Order overruling Defendant Towns' objections to the award of attorneys' fees and denying

Plaintiff's motion for reconsideration to amend the judgment so as to tax attorneys' fees as costs against the State of Alabama. In light of the above, it is the opinion of this Court that the above-mentioned verdicts, opinions and Orders of the Magistrate, as well as the Magistrate's rulings during the trial, do constitute specific findings of fact and proposed recommendations as to the motions made during the trial of this case as well as to the post-trial motions in this case and not subsequently amended by the Magistrate's recommendation of September 23, 1982. Therefore, this Court finds no merit to Defendants' ninth objection.

In light of the above-stated premises, this Court finds that:

1. The jury verdict and judgment entered against Defendant Towns in the

amount of $1.00 in compensatory damages and $25,000.00 in punitive damages are reasonable and should stand.

2. The judgment entered against Defendant Towns on August 13, 1980, is against Defendant Towns in his individual capacity.

3. The Plaintiff, Willie James Glover, as the prevailing party, is entitled to have an attorney's fee in the amount of $5,902.95 taxed as costs pursuant to 42 U.S.C. §1988, and said attorney's fee in the amount of $5,902.95 will be taxed as costs against the State of Alabama.

4. Judgment will be entered on the directed verdict in favor of Defendants Bennett, Cook, Britton and Alabama Board of Corrections.

Judgment will be entered in accordance with this Opinion.

The parties now agree that both thought they consented to the Magistrate's trial under § 636(c). The Court has found that they consented under § 636(b). This Court has attempted to comply with such a proceeding. This Court is impressed that, whether the agreement of the parties was construed as a consent under § 636(c), as a consent under § 636(b) or as an agreement to arbitration by the Magistrate and a jury, the parties agreed to the procedure, had a full opportunity to and did present the issues in the trial and were accorded a fair hearing without objection to the form thereof. It is difficult to understand how it can be said that the form of the agreed trial affected substantial rights. Rule 52, Federal Rules of Civil Procedure, provides:

> "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

While jurisdiction may not be waived, a finding made by an arbiter, agreed to by the parties, is binding except under very limited circumstances not here applicable. This Court agrees that the recommendation of the Magistrate and the verdict are supported by a preponderance of the evidence and adopts the same. Judgment will enter accordingly.

DONE this 13th day of December, 1982.

UNITED STATES MAGISTRATE

APPENDIX B

Glover v. Alabama Dept. of Corrections

Willie James GLOVER,

Plaintiff-Appellee,

v.

ALABAMA DEPARTMENT OF CORRECTIONS, et al.,

Defendants-Appellants.

No. 83-7122

Appeal from the United States District Court for the Middle District of Alabama.

Before GODBOLD, Chief Judge, RONEY and SMITH, Circuit Judges.

RONEY, Circuit Judge:

In November of 1978 plaintiff, Willie James Glover, a prisoner in Alabama's Draper Correctional Center was stabbed by a fellow inmate, Hardy Sims. The stabbing occurred the day after James Towns, a prison official, stated to a group of inmates that Glover's life was

worth only five or six packs of cigarettes. Glover brought a 42 U.S.C.A. §1983 action against the Alabama Board of Corrections and several other defendants including James Towns. At trial, the district court directed a verdict for all defendants except Towns. The jury returned a verdict of $1.00 in compensatory damages and $25,000.00 in punitive damages against defendant Towns in August of 1980.

Towns claims that (1) the U.S. Magistrate lacked subject matter jurisdiction to hear this case since defendants did not consent to a 28 U.S.C.A. § 636(b) proceeding; (2) the evidence is insufficient to support the finding that Towns' statement was the proximate cause of the stabbing; (3) the amount of punitive damages awarded was disproportionate to the actual damages;

and (4) testimony about problems between Towns and prison administrators should not have been admitted. We affirm.

[1] Defendant claims that because the parties' consent to trial before the magistrate was invalid under 28 U.S.C.A. § 636(c) due to a deficiency in the forms they signed, a new trial is warranted. This Court has already held that the parties' consent was sufficient to grant jurisdiction to the magistrate under § 636(b). Glover v. Alabama Board of Corrections, 660 F.2d 120, 124 (5th Cir. Unit B 1982) ("Glover II").

Both § 636(b) and § 636(c) provide for proceedings to be held before a United States Magistrate when the parties consent. 28 U.S.C.A. § 636(c); Calderon v. Waco Lighthouse for the Blind, 630 F.2d 352 (5th Cir.1980). The chief difference between (c) and (b) is that

(c) permits direct appeal from the magistrate to the court of appeals, while (b) provides for de novo review of the magistrate's findings and recommendations by the district court. In this case the parties, believing their consent to be adequate under § 636(c), cross-appealed to this Court following trial before the magistrate. See Glover v. Alabama Board of Corrections, 651 F.2d 1014 (5th Cir. Unit B 1981) ("Glover I"). The Court concluded that it lacked appellate jurisdiction due to a deficiency in the consent forms, but sent the case back to the district court after finding the parties' consent valid for purposes of § 636(b). See Glover II, 660 F.2d at 124. The district court properly concluded that it was bound by that determination, and conducted de novo review of the magistrate's

recommendations.

In any event, defendant has failed to show any actual harm to his cause which would support his request for a new trial. On the contrary, it appears that he benefited from the district court's review of the proceeding before the magistrate; the district court upheld one of the defendant's objections to the findings, and altered the magistrate's recommendation accordingly.

[2] A review of the record reveals sufficient evidence to warrant the inference that Towns' offer of five or six packs of cigarettes for the killing of Glover was the proximate cause of the attack on Glover the following day. Testimony indicated that the statement was made in the presence of all 150 inmates in Four Cell, where both Sims and Glover were incarcerated. Three

witnesses testified that defendant Towns stated that he would reward other prison inmates if the plaintiff were injured or killed.

[3,4] As to the punitive damages, there was no abuse of discretion in the district court's holding that the $25,000 award was neither so excessive as to be unconscionable, nor the product of jury bias or prejudice. Broad discretion is traditionally accorded to juries in assessing the amount of punitive damages. Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1980), for "[c]ourts are extremely reluctant to interfere with a jury verdict which may be based on such widely ranging bases as a desire to punish party for improper conduct and a desire to create a deterrent to similar conduct by

others." Adams v. Ford Motor Credit Co., 556 F.2d 737, 740 (5thCir. 1977).

[5] Punitive damages can be awarded under §1983 even when a plaintiff suffers no compensatory damages. Endicott v. Huddleston, 644 F.2d 1208, 1217 (7th Cir. 1980). Since plaintiff's injuries were cared for by the county and since, being incarcerated, he lost no income, the jury's decision to award plaintiff only $1 in compensatory damages could well be a response to the magistrate's instruction that nominal damages should be awarded if the jury "had no guidance or evidence as to a dollar and cents amount" representing plaintiff's suffering.

The jury's award of punitive damages reflects its finding that defendant acted wantonly, willfully, or in reckless disregard of plaintiff's rights. The

need for deterrence or punishment should not vary with the success of the assault in a case such as this. It cannot be said as a matter of law that the amount awarded is unconscionable or the product of jury bias or prejudice. Adams v. Ford Motor Credit Co., 556 F.2d at 740.

[6] The trial court's decision of the Warden's statement that defendant Towns was dismissed from the Department of Corrections does not rise to the level of an abuse of discretion. Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir.1978). The court sustained the defense objection to a follow-up question as to whether defendant's difficulty with prisoners was one of the reasons for the dismissal.

[7] The cross-examination of Towns, which concerned the reasons for his departure from the Department of

Corrections, is not grounds for reversal. Defense counsel did not object to the relevancy of the cross-examination and in fact, the only objection he raised concerned the form of one question. Defendant had formerly testified without objection that he left employment for personal reasons. Plaintiff was entitled to impeach defendant's testimony by attempting to show that the actual reasons were disciplinary rather than personal.

[8] The district court assessed attorney's fees and costs against the State of Alabama. Alabama was not a party to the suit at the time of this award, having been previously dismissed on its plea of immunity. The state appeals on the grounds that it was not a party to the suit, a directed verdict was rendered in favor of the Board of

Corrections, and damages were assessed against Towns in his individual capacity. The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C.A. §1988, gives the district court discretion to award attorney's fees.

Prior cases have held that attorney's fees may be awarded against a governmental entity even though the entity is immune from suit under the Eleventh Amendment or is not a named defendant in the §1983 action. See Hutto v. Finney, 437 U.S. 678, 699-700, 98 S.Ct. 2565, 2578, 57 L.Ed.2d 522 (1977); Williams v. Thomas, 692 F.2d 1032, 1039 (5th Cir.1982), cert. denied, ___U.S.___, 103 S.Ct. 3115, 77 L.Ed.2d 1369 (1983); McNamara v. Moody, 606 F.2d 621, 626 (5th Cir.1979), cert. denied, 447 U.S. 929, 100 S.Ct. 3028, 65 L.Ed.2d 1124 (1980). See also S.Rep. No. 1101, 94th Cong., 2d

Sess. 5 (1976), reprinted in 1976 U.S. Code Cong. & Ad.News 5908, 5913. There is no constitutional due process problem with assessing attorney's fees against the state in this case, where the Alabama Attorney General represented defendant Towns throughout the trial and before this Court on appeal. See Hutto, 437 U.S. at 669, 98 S.Ct. at 2578 (Supreme Court noted the Arkansas Attorney General's representation of defendant prison officials as indicative that the suit "was, for all practical purposes, brought against the State" even though the Eleventh Amendment prevented plaintiffs from naming the state as a party); Barrett v. Thomas, 649 F.2d 1193, 1201-02 (5th Cir. Unit A 1981), cert. denied, 456 U.S. 925, 102 S.Ct. 1969, 72 L.Ed.2d 440 (1982) ("the county's interests were adequately represented at

each stage of the proceedings by the county district attorney's representation of Sheriff Thomas"; county taxed with attorney's fees despite the fact that it was not a party to the action).

[9] The fact that damages were awarded against defendant Towns in his individual capacity only does not preclude the assessment of attorney's fees against the state. The sole reason that damages were not assessed against him in his official capacity is that the Eleventh Amendment bars such an award. Williams v. Bennett, 689 F.2d 1370, 1378 (11th Cir.1982), cert. denied, ___U.S.___, 104 S.Ct. 335, 78 L.Ed.2d 305. It is undisputed that defendant's statement was made while he was performing his official duties as an employee of the State of Alabama.

We note that the Fifth Circuit,

bound as we are by Van Ooteghem v. Gray, 628 F.2d 488 (5th Cir.1980), vacated in part, 654 F.2d 304 (5th Cir.1981)(en banc), cert. denied, 455 U.S. 909, 102 S.Ct. 1255, 71 L.Ed.2d 447 (1982), which affirmed such fees, has implemented the warning therein contained that "future plaintiffs can, and may be well advised to, join the local Government entity as a defendant in §1983 action." 628 F.2d at 495. In Hart v. Walker, 720 F.2d 1443, 1445 (5th Cir.1983), the Court said:

> That future has become the present. Because of the potential for unfairness in other factual settings, and in light of the potential conflicts of interest between the municipal entity and the putative public offical in section 1983 actions, we hold that our warning in Gray will henceforth be the rule of this circuit: To impose liability on a municipal or governmental entity in a section 1983 action filed after the date of this opinion, the plaintiff must join the entity as a defendant

in the suit.

Although the county in Hart was not immune, we think that the reasoning would apply to the state since the liability for attorney's fees and costs against it is not protected by immunity. The state could be made a party for the sole purpose of assessing attorney's fees and costs.

[10] In order to avoid future controversy over the potential unfairness of assessing attorney's fees against a governmental entity not a party to a §1983 suit, and over the potential conflict of interest between the Government and the public offical held liable under §1983, we hold that, even if otherwise immune, the governmental entity must be joined in the suit for purposes of the attorney's fees determination before it may be held liable for

attorney's fees. Following Hart, we hold that this policy shall be applied as the rule of this Circuit to all cases filed after the date of this opinion.

AFFIRMED.

APPENDIX C

GLOVER v. ALABAMA DEPT. OF CORRECTIONS

Willie James GLOVER,
Plaintiff-Appellee,

v.

ALABAMA DEPARTMENT OF
CORRECTIONS, et al.,
Defendants-Appellants.

No. 83-7122.

United States Court of Appeals,
Eleventh Circuit.

Feb. 27, 1985.

Prison inmate who had been stabbed by fellow inmate brought § 1983 action against various corrections officials. The United States District Court for the Middle District of Alabama directed verdict in favor of all but one prison official, entered judgment in favor of inmate against such official, and appeal

and cross appeal were taken. The Court of Appeals, 651 F.2d 1014, dismissed appeal and remanded cause for review in the District Court, and subsequently, 660 F.2d 120, denied rehearing. On remand, the United States District Court for the Middle District of Alabama, Robert E. Varner, Chief Judge, entered judgment in favor of inmate against prison official, and appeal was taken. The Court of Appeals, 734 F.2d 691, affirmed. On petitions for rehearing and suggestion for rehearing en banc, the Court of Appeals held that pursuant to the discretionary power of the court to award attorney fees under the Civil Rights Attorney's Fees Award Act, fact that damages were awarded against prison official in his individual capacity did

not preclude the assessment of attorney fees against the state, where official's actions were nonetheless taken while he was on duty and, throughout the litigation and on appeal, official was represented by the Attorney General.

Petitions for rehearing denied; suggestion for rehearing en bac denied.

Civil Rights Key 13.17(11)

Pursuant to discretionary power of the court to award attorney fees under the Civil Rights Attorney's Fees Award Act, fact that damages were awared in prisoner's § 1983 action against prison official in his individual did not preclude assessment of attorney fees against the state, where official's actions were nonetheless taken while he

was on duty and, throughout the litigation and on appeal, official was represented by the Attorney General. 42 U.S.C.A. §§ 1983, 1988.

Appeal from the United States District Court for the Middle District of Alabama.

ON PETITIONS FOR REHEARING
AND SUGGESTION FOR
REHEARING EN BANC

(Opinion June 18, 1984, 11 Cir., 1984, 734 F.2d 691).

Before GODBOLD, Chief Judge, RODNEY and SMITH*, Circuit Judges.

PER CURIAM:

Judgment was ordered against Towns in his individual capacity since the Eleventh Amendment barred recovery for

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*Honorable Edward S. Smith, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

actions taken in his official capacity. Towns' actions were taken though, while he was on duty. Throughout the litigation and on appeal, Towns was represented by the Attorney General. Pursuant to the discretionary power of the court to award attorney's fees under the Civil rights Attorney's Fees Award Act of 1976, 42 U.S.C.A. § 1988, the fact that damages were awarded against Towns in his individual capacity did not preclude the assessment of attorney's fees against the State. See Williams v. Thomas, 692 F.2d 1032, 1039 (5th Cir. 1982), cert. denied, ___U.S.___, 103 S.Ct. 3115, 77 L.Ed.2d 1369 (1983).

IT IS, THEREFORE, ORDERED that the Petitions for Rehearing are DENIED, and

no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

APPENDIX D

§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and the Title "CIVIL RIGHTS," and Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as

modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the

costs.

R.S. § 722; Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641; Pub.L. 96-481, Title II, § 205(c), Oct. 21, 1980, 94 Stat. 2330.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in

equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CERTIFICATE OF SERVICE

I, Billington M. Garrett, an Assistant Attorney General and a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the Alabama Department of Corrections, Petitioner, do hereby certify that on this 9th day of May, 1985, I did serve the requisite number of copies of the foregoing on the Attorney for Willie James Glover, Respondent, by mailing same to him, first class postage prepaid and addressed as follows:

Honorable Frank Wilson
P.O. Box 4357
Montgomery, Alabama 36107

Billington M. Garrett
BILLINGTON M. GARRETT
ASSISTANT ATTORNEY GENERAL

EDITOR'S NOTE

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JOSEPH F. SPANIOL, JR.
CLERK

NO. 84-1768

IN THE

SUPREME COURT OF THE UNITED STATES

ALABAMA DEPARTMENT OF CORRECTIONS,

PETITIONER,

vs.

WILLIE JAMES GLOVER,

RESPONDENT.

ON PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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FRANK M. WILSON
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418 South Hull Street
Montgomery, AL 36104
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Counsel of Record for
Respondent

QUESTION PRESENTED FOR REVIEW

Whether or not the decision below taxing attorney's fees as cost against the State of Alabama violates the Eleventh Amendment where the State of Alabama through its Attorney General voluntarily involved itself as counsel for the Defendant and admitted that his conduct was "within the scope of the discretion and responsibilities" of his office.

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NO. 84-1768_

IN THE
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vs.

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RESPONDENT.

ON PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of The United States Court of Appeals for the Eleventh Circuit is reported at 734 F.2d 691 (11th Cir. 1984). It appears as Appendix B to the Petition for Certiorari. The opinion of the United States District Court for the Middle District of Alabama appears as Appendix A to the Petition for Certiorari.

JURISDICTION

It appears that the Petition for Certiorari was filed within ninety days of February 27, 1985, the date of the denial of the Petition for Rehearing below. Jurisdiction of this Court appears to be conferred by 28 U.S.C. §1254.

STATEMENT OF THE CASE

Respondent, Willie James Glover, (hereafter "Glover") finds it necessary to include certain significant facts omitted from the Petitioner's statement of the case. It cannot be denied that the Defendant Towns was acting as an agent of the State at all times material to Plaintiff's complaint. Petitioner Alabama Department of Corrections (hereinafter "ADOC") admitted this in answer to paragraph 5 of Glover's complaint. (R.28). ADOC further stated in answer to Plaintiff's amended complaint that Towns' "conduct was within the scope of the discretion and responsibilities of their public offices and was reasonable and proper in light of all the circumstances as they appeared at the time of their conduct...". (R.27-28). It is further significant that Defendant Towns was represented at all times in this litigation by the Attorney General of the State of Alabama.

REASONS FOR DENYING THE WRIT

1. Petitioner has failed to present any "special or important reasons" for the grant of certiorari and have failed to invoke any of the criteria specified in Supreme Court Rule 17.1(a) and (c); there is no conflict with the decision of another federal court of appeals; there is no suggested departure "from the accepted and usual course of judicial proceedings;" and the decision below accords with applicable decisions of this Court.

The trial court correctly awarded attorneys fees against the State of Alabama. Glover is well aware that, in general, the Eleventh Amendment bars an award of damages against a state official in his official capacity or against the state. Edelman v. Jordan, 415 U.S. 651 (1974). Were it not for the Eleventh Amendment bar Plaintiff would be entitled to recover the judgment awarded him against the State of Alabama since Defendant Towns was admittedly acting within the line and scope of his employment as its agent.

Rather than conflict with this Court's decision in Hutto v. Finney, 437 U.S. 678 (1978) the court of appeal's decision is based on that ruling. In Hutto v. Finney, this court held that an award of attorney's fees under 42 U.S.C. §1988 was not barred by the Eleventh Amendment. Hutto differed from the instant case, however, because it concerned an award of injunctive relief. Subsequently, the Fifth Circuit Court of Appeals correctly interpreted Hutto and held that attorneys fees may be awarded a successful Plaintiff against a State employee even though only monetary damages are awarded. McNamara v. Moody, 606 F.2d 621 (5th Cir. 1979). As the court stated in McNamara, "there is no Eleventh Amendment bar to such award and they need not be based on bad faith." 606 So.2d at 626.

Plaintiff submits that the policy behind the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. §1988 supports the decision to award attorneys fees against the State. In passing that statute, Congress sought to encourage individuals to file suit to vindicate their

constitutional rights by awarding attorneys fees to successful plaintiffs. As a practical matter an award of attorney's fees against Defendant Towns alone is the same as refusing to award attorney's fees at all. Defendant Towns is a low-level state employee and satisfaction of any judgment against him will be extremely difficult. On the other hand, attorney's fees awarded against the State will most certainly be paid. That latter course is much more likely to encourage individuals to attempt to vindicate their constitutional rights.

ADOC argues that because the State of Alabama has never been a party to this litigation attorneys fees cannot be taxed as costs against it. That argument is totally without merit. Congress made clear in the legislative history of the Act that those fees could be awarded against the government whether or not it is a named party. S.Rep. No. 94-1011, 94th Cong., 2d Sess. 5, reprinted in 1978 U.S. Code Cong. and Admin. News pp. 5908, 5914. In Barrett v. Thomas, 649 F.2d 1193 (5th Cir. 1981) the Fifth Circuit Court of Appeals stated:

> It is beyond settle law that a section 1988 attorneys fees award may run against a public treasury for section 1983 violations by public officers acting in their official capacities even though the public entity is not named as a defendant in the suit.

649 F.2d at 1201.

In Barrett, the Court held that an attorneys fee could be awarded against a county for §1983 violations by a sheriff even though the county was not named as a defendant

in the suit and was denied an opportunity to intervene. In the instant case, the State of Alabama has been protected at all times by representation by the Attorney General. Indeed the State of Alabama voluntarily involved itself in this lawsuit by representing the Defendant employee at every stage of the litigation. It cannot now argue that the judgment was against that Defendant - its admitted agent - only in his "individual capacity" and seek to disclaim any liability for attorney's fees arising out of his conduct.

The Eleventh Circuit Court of Appeals articulately stated why the ADOC's argument on this issue must fail:

> The fact that damages were awarded against defendant Townes in his individual capacity only does not preclude the assessment of attorney's fees against the State. The sole reason that damages were not assessed against him in his official capacity is that the Eleventh Amendment bars such an award. (Citations omiteed). It is undisputed that the defendant's statement was made while he was performing his official duties as an employee of the State of Alabama.

734 F.2d at 696 (1984).

CONCLUSION

Accordingly, Petitioners have failed to advance any reason for the grant of certiorari and, for the foregoing reasons, it is respectfully submitted that its petition should be denied.

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CERTIFICATE OF SERIVCE

I hereby certify that on this the 22nd day of August, 1985, a copy of the foregoing brief was served on the Honorable Billington M. Garrett, Assistant Attorney General, by placing same in the U.S. Mail, postage prepaid and properly addressed to him at 250 Administrative Building, 64 North Union Street, Montgomery, Alabama, 36130.

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